UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO DIVISION OF JUDGES

WINDSOR SKYLINE CARE CENTER

and Case 32–CA–076250

SEIU UNITED HEALTHCARE WORKERS – WEST

WINDSOR MONTEREY CARE CENTER

and Case 32–CA–076255

SEIU UNITED HEALTHCARE WORKERS – WEST

WINDSOR COUNTRY DRIVE CARE CENTER

and Case 32–CA–076262

SEIU UNITED HEALTHCARE WORKERS – WEST

WINDSOR THE RIDGE REHABILITATION CENTER

and Case 32–CA–076266

SEIU UNITED HEALTHCARE WORKERS – WEST

Noah J. Garber Esq., for the General Counsel. Robert M. Stone, Esq., for the Respondent. Manuel A. Boigues, Esq., for the Charging Party.

DECISION

Statement of the Case

Eleanor Laws, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts approved by Acting Associate Chief Administrative Law Judge Gerald M. Etchingham October 4, 2012. SEIU United Healthcare Workers – West (the Charging Party or Union) filed the respective charges in each of the above-captioned cases on March 8, 2012, and the Acting General Counsel issued the consolidated Complaint on June 15, 2012. The Respondents, Windsor Skyline Care Center (Skyline), Windsor Monterey

Care Center (Monterey), Windsor Country Drive Care Center (Country), and Windsor the Ridge Rehabilitation Center (Ridge), filed a timely consolidated answer on June 29, 2012, denying all material allegations and setting forth affirmative defenses.

The Complaint alleges that Respondents violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally ceasing to check off Union dues employees had authorized as payroll deductions and ceasing to remit those dues to the Union upon expiration of the respective collective bargaining agreements.¹

On the entire record and after considering the briefs filed by the Acting General Counsel and Respondents,² I make the following

Findings of Fact

15 I. Jurisdiction

The various Windsor facilities—Skyline, Monterey, Country Drive, and Ridge—are each California limited liability corporations. Skyline and Ridge have facilities in Salinas, California; Monterey has a facility in Monterey, California; and Country has a facility in Fremont, California. Respondents Skyline, Monterey, and Country operate nursing homes that provide medical care. Respondent Ridge operates a skilled nursing facility that provides medical care. Respondents admit, and I find, that each is a health care institution within the meaning of Section 2(14) of the Act. Respondents each derived gross revenues in excess of \$100,000 and purchased and received goods or services valued at \$5,000 from points outside of California. Respondents admit, and I find, that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Collective Bargaining Agreements

1. Skyline

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At all material times since at least December 2009, Skyline has recognized the Union as the exclusive bargaining representative for the following unit:

All full-time and regular part-time certified nursing assistants, restorative nursing assistants, nursing assistants, care partners uncertified assistive personnel, cooks, dietary aides, housekeepers, janitors, laundry aides and maintenance workers employed by Respondent Skyline at its Salinas, California facility; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

¹ Other recent cases allege essentially the same violation, challenging *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds, 320 F.2d 615 (3d Cir. 1963). See, e.g., *WKYC*, Inc., 8–CA–39190, JD–60–11 (2011 WL 4543697); *Nebraskaland, Inc.*, 2–CA–39996, JD(NY)–46–11 (2011 WL 6002194); *USIC Locating Services, Inc.*, 6–CA–37328, JD–03–12 (2012 WL 76860); WHDH-TV, 1–CA–46744, JD(NY)–10–12 (2012 WL 1229612); *Healthbridge Mgt., LLC*, 34–CA–12964, JD(NY)–21–12 (2012 WL 2992088), and *C & G Distributing Co., Inc.*, 9–CA–78875, JD–57–12 (2012 WL 5494946).

² The Union did not file a brief.

The Union and Skyline have entered into successive collective bargaining agreements, the most recent (the Skyline Agreement), effective from December 1, 2009 to December 31, 2011.

Monterey

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At all material times since at least December 2009, Monterey has recognized the Union as the exclusive collective bargaining representative for the following unit:

All full-time and regular part-time certified nursing assistants, restorative nursing assistants, nursing assistants, care partners uncertified assistive personnel, cooks, dietary aides, housekeepers, janitors, laundry aides and maintenance workers employed by Respondent Monterey at its Monterey, California facility; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

The Union and Monterey have entered into successive collective bargaining agreements, the most recent (the Monterey Agreement), effective from December 1, 2009 to December 31, 2011.

3. Country

At all material times since at least December 2009, Country has recognized the Union as the exclusive collective bargaining representative for the following unit:

All full-time and regular part-time certified nursing assistants, restorative nursing assistants, nursing assistants, care partners uncertified assistive personnel, cooks, dietary aides, housekeepers, janitors, laundry aides and maintenance workers employed by Respondent Country at its Fremont, California facility; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

The Union and Country have entered into successive collective bargaining agreements, the most recent (the Country Agreement), effective from December 1, 2009 to December 31, 2011.

4. Ridge

At all material times since at least December 2009, Country has recognized the Union as the exclusive collective bargaining representative for the following unit:

All full-time and regular part-time certified nursing assistants, restorative nursing assistants, nursing assistants, care partners uncertified assistive personnel, cooks, dietary aides, housekeepers, janitors, laundry aides and maintenance workers employed by Respondent Ridge at its Salinas, California facility; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

The Union and Ridge have entered into successive collective bargaining agreements, the most recent (the Ridge Agreement), effective from December 1, 2009 to December 31, 2011.

B. Union Security and Dues Check-off Provisions

Each of the collective bargaining agreements described above contains an identical union security and dues check-off provision. The Union security provision, Article 3.1, states:

Not later than the thirty-first (31st) day following the beginning of employment, or the effective date of this Agreement, or the execution date of this Agreement, whichever is later, every employee subject to the terms of this Agreement shall, as a condition of employment, become and remain a member of the Union, paying the periodic dues and initiation fees uniformly required, or, in the alternative, shall, as a condition of employment, pay a fee in the amount equal to the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership, or, if the employee objects to the payment of that agency fee, such employee shall, as a condition of employment, pay that portion of the agency fee that is related to the Union's representation costs. At the time a new employee is hired who will be subject to this Agreement, the Employer shall deliver to the employee a written notice stating that the Employer recognizes the Union as the collective bargaining agent for the employees covered by this Agreement and quoting or paraphrasing the provisions of this Section of the Agreement, and the Beck Notice.

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The voluntary dues check-off provision, Article 3.2, states:

Upon voluntary signed authorization by an employee, the Employer agrees to deduct the Union dues and initiation fees, and remit same to the office of the Union not later than the 10th day of the month following the month in which the dues were deducted.

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(Exhibit 5). The dues for each of the Respondents' employees equal approximately two percent of their bi-weekly wages.

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As of December 31, 2011, approximately 60 Skyline unit employees authorized payroll deductions for Union dues, as did approximately 63 Monterey unit employees, 84 Country unit employees, and 92 Ridge unit employees. No employee revoked his or her authorization between December 31, 2011 and August 10, 2012.

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C. Cessation of Dues Check-off

Upon expiration of each of the collective bargaining agreements described above, without giving notice to the Union, the Respondents ceased checking off union dues from employees who had signed payroll deduction authorizations and ceased remitting those dues to the Union. The Respondents failed to deduct and remit the Union dues from January 1, 2012 until new collective bargaining agreements were reached at each facility on August 10, 2012.

III. Decision and Analysis

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As the Acting General Counsel concedes, this Complaint is an attempt to overturn the Board's decision in *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds, 320 F.2d 615 (3d Cir. 1963), and cases following it. In *Bethlehem Steel*, the Board reasoned that because the Union's rights to dues checkoffs was created by contracts, "when the contracts terminated, the Respondent was free of its checkoff obligations to the Union." *Id.* at 1502.

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To support its contention that *Bethlehem Steel* should be overturned, the Acting General Counsel first notes that the Court of Appeals for the Ninth Circuit has twice vacated and remanded Board decisions in *Hacienda Resort Hotel & Casino*, 331 NLRB 665, 667–72 (2000) (*Hacienda I*), vacated and remanded sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 584–85 (9th Cir. 2002); and *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007) (*Hacienda II*), vacated and remanded sub nom. Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB, 540 F.3d 1072 (9th Cir. 2008), because it was

unable to discern the Board's rationale for excluding dues checkoffs from the unilateral change doctrine.³ Further, in *Hacienda Resort Hotel & Casino* (*Hacienda III*), 355 NLRB No. 154 (2010), on second remand from the Ninth Circuit the Board was deadlocked 2–2 on whether to overturn *Bethlehem Steel*.⁴ Lacking a majority to form a different rule, the Board adhered to *Bethlehem Steel* and its progeny. On appeal, the Court held "there is no justification for carving out an exception to the unilateral change doctrine for dues-checkoff in the absence of union security." *Local Joint Executive Board of Las Vegas, Culinary Workers Local* 226 v. NLRB, 657 F.3d 865, 874–75 (2011). Importantly, the Court did not rule on the situation, present here, where there is a union security clause compelling employees to join the Union or pay dues to it as a condition of employment.

The Acting General Counsel raises additional arguments to support its position that *Bethlehem Steel* should be reversed. I am, however, bound by Board precedent. See *Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). I further note that the Board has recently declined to reverse *Bethlehem Steel*. See *Hargrove Electric Co.*, 358 NLRB No. 147, slip op. at 1 fn.1 (2012).

The Respondents assert that any reconsideration of *Bethlehem Steel* should also include a holding that dues checkoff is not a mandatory subject of bargaining.⁵ Respondents acknowledge, however, that this cannot occur until the matter reaches the Board. The same holds true for Respondents' arguments based on estoppel, manifest injustice, and statutory violations.

Based on the foregoing, I conclude that the Respondents' actions of ceasing to check off Union dues from employees who had signed payroll deduction authorizations and ceasing to remit those dues to the Union from December 31, 2011 to August 10, 2012 did not violate Section 8(a)(1) and (5) of the Act.

Conclusions of Law

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Respondents' actions of ceasing to check off Union dues from employees who had signed payroll deduction authorizations and ceasing to remit those dues to the Union did not violate Sections 8(a)(1) and (5) of the Act.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire stipulated record, I issue the following recommended⁶

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³ Pursuant to *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), unilateral changes to mandatory subjects of bargaining violate the Act.

⁴ One Board member had recused himself.

⁵ I note the Respondents' brief requests a holding that dues checkoff is a mandatory subject of bargaining and can only conclude there is an inadvertent omission of the word "not".

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

	The complaint is dismissed.	
5	Dated, Washington, D.C November 26, 2012	
10 15		Eleanor Laws Administrative Law Judge